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OPINIONS ON EVIDENCE OPINIONS BY THE SEVENTH CIRCUIT COURT OF APPEALS

JAMES C. MURRAY*

During the 1981-82 term, the United States Court of Appeals for the Seventh Circuit handed down a significant number of decisions addressing evidentiary issues. These decisions covered the entire ambit of the law relating to proof of facts in the federal courts. To analyze each decision would result in something akin to a Restatement of the Law of Evidence, which would be of little value to either the students of the law or its practitioners. Several of the opinions, however, should be of particular interest to the Illinois trial practitioner in light of the recent changes in Illinois' law of evidence.

The Illinois Supreme Court has never adopted any sort of codification of the Federal Rules of Evidence for use in the Illinois courts. In fact, the Supreme Court rejected a committee¹ recommendation, made after almost two years of study, that the Federal Rules, tempered by Illinois statutory law, be adopted. Despite the Illinois Supreme Court's reluctance to formally adopt the Federal Rules, there appears to be a recent tendency on the part of the court to adopt Federal Rules of Evidence that are not completely compatible with Illinois evidence law on a case by case basis.²

Accordingly, the author believes that it would be of interest to the lawyers and students who desire to try cases in both the state and federal courts to examine and study those opinions of the Seventh Circuit Court of Appeals that relate to one of the most recent changes in the Illinois rules of evidence: the adoption of Federal Rules 703³ and 705⁴

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1. On November 7, 1975, the Illinois Supreme Court appointed the *Committee to Study and Recommend Rules of Evidence* to suggest clarifications and or changes in Illinois' rules of evidence.

2. See, *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

3. FED. R. EVID. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

4. FED. R. EVID. 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires

pertaining to expert or opinion testimony. This article is therefore limited to an analysis of the Seventh Circuit's recent opinions on expert or opinion evidence and the use of extrapolation.

I. THE ADMISSABILITY OF OPINION EVIDENCE

In *Wilson v. Clark*,⁵ the Illinois Supreme Court adopted Federal Rules 703 and 705 relating to expert testimony and the basis of expert opinion. The dramatic nature of this change in Illinois law is illustrated by the fact that the court applied *Wilson v. Clark* prospectively.

Specifically, *Wilson* not only eliminated the requirement of the hypothetical question to glean the expert opinion, long an Illinois trial practice staple, but it also substantially broadened the basis of opinion testimony by experts. Before *Wilson*, the opinion of an expert in Illinois trial courts had to be based on facts in evidence. After *Wilson*, the expert opinion is admissible if the facts upon which the expert's opinion is based are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject".⁶ The facts upon which the expert relied need not be admissible in evidence.

Prior to *Wilson*, an expert's opinion on issues of fact presented during a state trial were only admissible after the expert stated he had an opinion based on a hypothetical set of facts posed by the trial lawyer seeking the opinion. If an opponent objected on the ground that the hypothetical question did not contain all the relevant facts and then proceeded to state those missing facts, the trial court would permit the expert to testify, provided all relevant facts were contained in or added to the hypothetical question.

If the opponent objected on the ground that the hypothetical question contained relevant facts about which there had been no evidence as yet presented, the trial judge would permit the expert's opinion into evidence only upon a representation by the questioner that he would "tie it up" by later presenting evidence which proved the hypothetical facts. Should the questioner fail to "tie up" his hypothetical question, the court would strike the expert's opinion upon proper motion or objection. In a jury trial, the court would instruct the jury to disregard the expert's testimony.

otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

5. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

6. *Id.* at 193, 417 N.E.2d at 1326, quoting FED. R. EVID. 703.

Given the importance of the hypothetical question in getting an expert's opinion into evidence, the trial strategy involved in asking the question was one of meticulous care. In complex cases, the hypothetical question often took hours to ask.

After *Wilson*, an expert's opinion can be gleaned at trial in minutes. The cross-examination of the expert supplants the necessity of the hypothetical question. Moreover, the party offering an expert's opinion need not worry about whether there is proof of every fact relevant to the expert's opinion. As long as the facts upon which the expert's opinion is based are of a type reasonably relied upon by similar experts, the opinion will be admissible.⁷

This liberalization of Illinois rules, however, is not without some limitation. While the adoption of Federal Rules 703 and 705 will allow Illinois trial courts to go much further in permitting expert testimony than they could prior to *Wilson*, recent Seventh Circuit cases suggest that the rules permitting expert or opinion evidence are not invitations for opinions from anyone who considers himself or herself an expert.

In *United States v. Tranowski*⁸ the Seventh Circuit Court of Appeals made it clear that the facts upon which an expert opinion is based must themselves be accepted scientific data. *Tranowski* involved the admissibility of an astronomer's opinion of the date a picture was taken in order to discredit an alibi defense to a charge of uttering a counterfeit bill.

Defendant Tranowski claimed he was in the backyard of his home at the time the counterfeit bill was uttered, and offered a photograph to prove his alibi. The prosecution then offered the testimony of an astronomer who testified that, by measuring the length and direction of shadows in the photograph,⁹ he could determine the position of the sun

7. *Id. Accord*, *People v. Pitts*, 104 Ill. App. 3d 451, 432 N.E.2d 1062 (1982), wherein the Appellate Court, relying upon *Wilson*, affirmed the admission of a doctor's opinion testimony which was based in part on statements in medical reports not previously seen by the doctor. *But see*, *People v. Sanders*, 103 Ill. App. 3d 700, 431 N.E.2d 1145 (1981), wherein the Appellate Court affirmed a trial court's refusal to allow a defense psychologist to testify because the record failed to establish that tests which formed the basis of the doctor's opinion were commonly used by the medical profession in forming professional opinions and that the doctor's opinion was based exclusively, rather than in part, on materials not in the record. *See also*, Honorable Warren D. Wolfson, Address to the Illinois Defense Council Seminar (Summer, 1982).

8. 659 F.2d 750 (7th Cir. 1981).

9. The astronomer in *Tranowski* expressed the ultimate opinion that the photograph could not have been taken on May 12, 1974, as Mr. Tranowski had testified in the counterfeit trial. The expert testified the photograph had to be taken either on April 13 or August 31, 1974.

The expert based his opinion on his testimony that as the earth revolves around the sun its orientation is fixed toward the North Star. Therefore, the sun's path as perceived in the daytime sky repeats itself from year to year. Twice a year, on dates equidistant from the summer or winter solstices, the sun will be in precisely the same location with respect to the horizon and North Star.

on the day the picture was taken. Then, by reference to a chart of sun positions, he opined that the date of the picture could not possibly have been the date of the crime. The trial judge permitted the testimony of the expert under Federal Rule 702 as scientific, technical, or specialized knowledge assisting the trier of fact.¹⁰ Over objection, he also permitted the sun chart to be introduced into evidence under Rule 104(a)¹¹ because it had the "circumstantial guarantees of trustworthiness" required by Rule 804(b)(5).¹²

On appeal, the court held it was error to admit the sun chart because it had been unverified as to its accuracy in dating photographs. The authorship of the chart had been unknown and there was no evidence that the chart had been relied on by experts in the field other than the one testifying. In rejecting the chart, the court stated:

The chart, being unverified for its accuracy in dating photographs, and not being relied on by experts in the field other than Ciupik, lacked any circumstantial guarantees of trustworthiness.¹³

The court also rejected the expert's opinion testimony as to the date the photograph was taken because his opinions were not based on facts of a type reasonably relied upon by experts in the particular field in forming opinions as required by Rule 703 of the Federal Rules of Evidence. The court stated:

The astronomer testified that if one knew the compass orientation of an object in the photo, it would be possible to date that photo by (1) measuring the directional angle of the shadow cast by that object to determine the azimuth of the sun (that is, the sun's angle from true north), and (2) measuring the angle of the complete shadow cast by another object in the photograph to determine the altitude of the sun (the angle formed by the sun's elevation above the horizon).

10. FED. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

11. FED. R. EVID. 104(a) reads:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

12. FED. R. EVID. 804(b)(5) states:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

13. *United States v. Tranowski*, 659 F.2d 750, 755 (7th Cir. 1981).

Aside from the untrustworthiness of the chart, and in spite of the particularly wide discretion of a trial judge in admitting or not admitting expert testimony, . . . we believe that the technology Cuipik relied on was not "sufficiently established to have gained general acceptance in the particular field to which it belongs."¹⁴

The court indicated that had the procedure used by the expert been tried before, or had it been tested for verification before trial or supported by a published work as a methodology to date photographs, the result might have been different.¹⁵

The court concluded its discussion of the opinions of the astronomer with the following quotation from *United States v. Brown*:

A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness' although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field.¹⁶

Tranowski thus requires an accepted scientific basis for expert opinions. The "aura of special reliability" must have something to back it up. While requiring a basis for expert testimony, the Seventh Circuit has made it clear that if an accepted basis can be established, the facts upon which the expert's opinion is based need not be admissible as evidence for the opinion itself to be admissible.

In *United States v. Lawson*,¹⁷ the defendant raised an insanity defense to charges of extortion and assault on a federal officer. The government's expert psychiatrist was permitted to testify to the defendant's sanity over the defendant's objection. The psychiatrist's testimony was based on reports and information from various sources which had never been introduced into evidence.

The Court of Appeals noted that, prior to the adoption of Rule 703, the evidence would have been excluded.¹⁸ However, the court ruled that the adoption of the Federal Rules expanded the scope of expert testimony and that Rule 703 expressly permits experts to base their testimony on evidence that would otherwise be inadmissible so long as it is of a type reasonably relied on by experts in the particular

14. *Id.* at 755-756 quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

15. *Id.* at 756 n.11.

16. *Id.* at 757 (quoting *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977)).

17. 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1017 (1982).

18. *Id.* at 303 n.12. The Court of Appeals noted that it considered *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971), distinguishable on its facts from the *Lawson* case. *Bohle* was written prior to the adoption of the Federal Rules of Evidence and to the extent it conflicts with the *Lawson* opinion, it was overruled.

field in forming opinions or inferences upon the subject.¹⁹

The court noted that the admission of testimony based in large part on hearsay may cause problems, especially in criminal cases, if there is no adequate opportunity to cross examine the expert witness.²⁰ Nevertheless, the court observed that the Advisory Committee Notes on Rule 703 state that the rule presupposes that the cross examiner has the advance knowledge essential for effective cross-examination. The court concluded that the record in the *Lawson* case indicated that the defendant had sufficient access to the information the psychiatrist used to reach his opinion.²¹

The testimony the Court of Appeals deemed admissible in *Lawson* would not have been permitted in Illinois trial courts prior to the *Wilson* decision because the expert's opinion was based on hearsay reports and on information which had not been introduced into evidence. Since *Wilson*, however, experts are permitted to express opinions even though all the facts upon which their opinions are based are not in evidence. Of course, Illinois trial courts will follow the *Lawson* court's example and require that the expert opinion be based on data customarily relied on by experts in forming opinions. Illinois rules also contemplate full discovery of the basis of the expert's opinion.²² Thus, Illinois courts will probably follow *Lawson* and allow opinions based in part on hearsay reports provided such reports are of the type that experts would typically rely on in making a professional judgment.

The court in *Lawson* also approved the use of lay witnesses (three F.B.I. agents who had observed Lawson) to testify as to his sanity. The court held that Rule 701²³ of the Federal Rules expressly permits opinion testimony of lay witnesses that may not have been admissible otherwise. On this point, the court said:

These cases hold that while a lay witness may testify about the conduct, assertions, appearance, and manner of speech of the defendant, they may only state an opinion on an ultimate issue such as sanity when the witness has been qualified by sufficient association with an opportunity to observe the subject. *United States v. Alden*, 476 F.2d 378, 385 (7th Cir. 1973). The adoption of the Federal Rules, how-

19. *Id.* at 301-302.

20. See Wolfson, *supra* note 7. Judge Wolfson points out that Rules 703 and 705 make no distinction between civil and criminal cases.

21. 653 F.2d at 302-303.

22. See *supra* note 7.

23. FED. R. EVID. 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

ever, modified the requirement. The rules permit the introduction of substantially more evidence than was formerly admissible. They place great reliance on cross-examination, for much evidence is now admissible subject to cross-examination as a means of verification. It is then up to the fact finder to determine the weight to be attached to that evidence.²⁴

The court in *Lawson* sustained the trial court's admitting the opinions of the three F.B.I. agents as to his sanity even though the cross-examination had disclosed they observed him only once.

Illinois courts would follow the Court of Appeals' decision in *Lawson* on the admissibility of the lay testimony of the F.B.I. agents. The Illinois rules of evidence relating to lay witnesses²⁵ are similar to Federal Rule 701.²⁶ Lay witnesses' opinions are admissible if the opinions are based on personal observation, experience or preception and cannot be expressed factually in an understanding manner.²⁷ Federal Rule 701 permits opinion testimony of lay witness (1) if it is rationally based upon the witness' perceptions and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.²⁸

Another case involving Federal Rule 701 is *Bohannon v. Pegelow*.²⁹ That case involved an appeal from a jury award of compensatory and punitive damages in a civil rights suit. During the trial, the judge admitted the testimony of an eyewitness who testified that the arrest was racially motivated. The defendant argued on appeal that the testimony was merely a personal opinion regarding the mental state of another, and thus the admission of the testimony into evidence was reversible error. The Seventh Circuit held that Rule 701 permits lay opinion testimony and does not limit the subject matter to which it relates.

The court suggested that Rule 701 should be read literally and ought not be read or be circumscribed to exclude lay opinion testimony as to the mental state of another. The court stated:

If Congress had intended to limit the competency of lay opinion testimony, it could have so stated as it did in other Rules of Evidence, see Rules 404, 608(b), and 609(a). However, Congress did not do so and appellate courts should not graft exceptions and limitations upon the Rules of Evidence.³⁰

24. 653 F.2d at 303.

25. See CLEARY AND GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 701.1 (3d ed., 1979).

26. See *supra* note 23.

27. *Kapelski v. Alton & Southern R.R.*, 36 Ill. App. 3d 37, 343 N.E.2d 207 (1976); *State Farm Mut. Auto Ins. Co. v. Short*, 125 Ill. App. 2d 97, 260 N.E.2d 415 (1970).

28. See *supra* note 23.

29. 652 F.2d 729 (7th Cir. 1981).

30. *Id.* at 732.

The court did not, however, put its imprimatur on all lay opinion testimony as to the state of mind of a third party. The court continued:

This does not mean that lay opinion testimony as to another person's mental state must be admitted by the trial court. The Rule states that the testimony must be 'helpful to a clear understanding of his [the witness'] testimony or the determination of a fact in issue.' Additionally, the considerations outlined in Rule 403 apply. Thus, the decision as to admissibility is within the sound discretion of the trial judge and the issues involved are peculiarly suited to his determinations.³¹

Once the lay opinion testimony is considered "helpful", the only factual basis necessary for the testimony is the lay witness' perception of the event. Quoting from a Fifth Circuit case, the court stated:

When, as here, the witness observes first hand the altercation in question, her opinions on the feelings of the parties are based on her personal knowledge and rational perception and are helpful to the jury. The Rules require nothing more for admission of the testimony. (Citations omitted).³²

An argument that the witness' testimony does not contain facts which indicated the defendant's social prejudice thus goes to the weight and not the admissibility of the evidence; Rule 701 contemplates that such weakness in the testimony will be discovered and emphasized through cross-examination.

Finally, the Seventh Circuit rejected the defendant's argument that the witness' testimony should be excluded because it concerned a key issue in the case (the defendant's motivation). The court believed that Federal Rule 704³³ permits such opinion testimony on ultimate issues.

It is unclear whether Illinois trial courts would follow *Bohannon v. Pegelow*. First, Illinois permits testimony on "state of mind" under the exception to the hearsay rule for declarations relating to condition of mind or emotion existing at the time of the statement if made under circumstances indicating apparent sincerity.³⁴ In *Bradley v. Booz*, the Illinois Appellate Court permitted survey results into evidence under the state of mind exception, and stated:

In *Holiday Inns Inc.* and *Zippo* survey results were found admissible pursuant to the 'state of mind' exception to the hearsay rule. It

31. *Id.*

32. *Id.*, quoting *John Hancock Mutual Life Ins. Co. v. Dutton*, 585 F.2d 1289, 1294 (5th Cir. 1978).

33. FED. R. EVID. 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

34. *Bradley v. Booz*, Allen & Hamilton, Inc., 67 Ill. App. 3d 156, 163, 384 N.E.2d 746, 751 (1978).

should be noted that the 'state of mind' exception to the hearsay rule would apply to the aforementioned Level 1 hearsay—the responses of the interviewees to the interviewer. The 'state of mind' exception applies to declaration relating to a condition of mind or emotion existing at the time of the statement and *must have been made under circumstances indicating apparent sincerity*. (McCormick, *Handbook of the Law of Evidence* § 294 (2nd ed. 1972)). Therefore, if the responses of the interviewees reflected present state of mind, these responses could be encompassed by the 'state of mind' exception to the hearsay rule. (Emphasis supplied.)³⁵

Thus, in the factual situation of *Bohannon*, before the witness' testimony as to the defendant's state of mind at the time of the plaintiff's arrest, it would have to be accompanied by testimony of words or actions observed or heard by the witness disclosing a racial prejudice, and some indication that the words or actions were said or done with apparent sincerity. Neither element was present in *Bohannon v. Pegelow*, as the witness did not give an opinion based on any facts of the defendant's conduct at the time of the arrest, but rather testified as to her perception of the defendant.

Secondly, Illinois has not yet adopted Rule 704 as it applies to lay opinions on ultimate issues in a case.³⁶ Illinois has permitted expert testimony as to ultimate questions,³⁷ but whether Illinois courts will permit lay opinion to be used as liberally as in *Bohannon* is still an open question in Illinois evidentiary law. However, the Illinois Supreme Court has indicated that lay opinion testimony may not be admissible as to certain kinds of ultimate issues. In *Delaney v. Badame*,³⁸ the trial court refused to allow plaintiff's lawyer to ask a witness whether 30 miles an hour was too fast a speed to drive around a curve where an accident happened. In refusing such testimony on the ultimate issue of the defendant's willful and wanton conduct in driving too fast, the court stated:

It has been held in this State that a witness familiar with the speed of a vehicle may testify to the speed of an observed vehicle, and although unable to give the speed in miles per hour, he may state it as fast or slow. (*McKenna v. Chicago City Ry. Co.*, 296 Ill. 314). This is not to say that a witness can say what he believes too fast a speed is.

35. *Id.* at 163.

36. See CLEARY & GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 704 (3d ed., 1979); *Gillete v. City of Chicago*, 396 Ill. 619, 72 N.E.2d 326 (1947); *Village of Marissa v. Jones*, 327 Ill. 180, 158 N.E. 389 (1927).

37. *Coleman v. Ill. Central R.R. Co.*, 13 Ill. App. 3d 442, 300 N.E.2d 297 (1973), *rev'd on other grounds*, 59 Ill. 2d 13, 319 N.E.2d 228 (1974); See, *Kobrand v. Foremost Sales Promotions Inc.*, 8 Ill. App. 3d 418, 291 N.E.2d 61 (1972); *Johnson v. Ward*, 6 Ill. App. 3d 1015, 286 N.E.2d 637 (1972).

38. 49 Ill. 2d 168, 274 N.E.2d 353 (1971).

All of the charges of wilful and wanton conduct contained in the complaint relate to the speed at which the minor defendant was allegedly operating his automobile and whether the speed was too fast was an ultimate fact to be determined by the jury.³⁹

Because *Bohannon* and *Delaney* both involved the ultimate issue of wilful and wanton conduct, *Delaney* indicates that Illinois courts may not follow *Bohannon*.

The Seventh Circuit has also made it clear that the witness expressing an opinion does not need a great deal of expertise to qualify as an "expert" witness. In *United States v. Winograd*,⁴⁰ the defendant was convicted of conspiring to defraud the Treasury Department's collection of taxes, aiding the preparation of fraudulent income tax returns, and entering into fixed and uncompetitive commodity futures transactions and wash sales. To establish the jurisdictional basis concerning the commodity futures transaction and tax straddles, the trial judge permitted the testimony of a witness who was employed by the Commodities Future Trading Commission in market examinations for over four years. His knowledge of the subject upon which he expressed opinions was acquired solely from reading various unnamed books. Nevertheless, the Appeals Court refused to overturn the District Court's decision permitting the testimony, stating:

We agree with appellants that the Government's qualification of [the witness] might have been *arguably inadequate* had he testified regarding the more technical and esoteric areas of commodity futures transactions and tax straddles. *His knowledge apparently was acquired solely from reading various unnamed books*. However, we do not believe the trial court abused its discretion in allowing [the witness] to testify without *voir dire* examination regarding some of the more mechanical aspects of futures transactions and, for example, whether they could be used to hedge other transactions. *His testimony was not shown to be incorrect and undoubtedly aided the jury in understanding the issues*. *Kline v. Ford Motor Co. Inc.*, 523 F.2d 1067 (9th Cir. 1975). He had been employed by the CFTC in market examination for over four years and appellants themselves have relied upon some of [the witness'] testimony in making their arguments to this court. The district judge's decision, therefore, will not be overturned.⁴¹

Thus, even an esoteric "book education" may be sufficient to qualify a witness as an "expert" provided that the testimony "aids the jury in understanding the issues."

This requirement that the expert's testimony aid the jury's understanding or help the jury decide a real issue in a case tempers the leni-

39. *Id.* at 178, 274 N.E.2d at 358.

40. 656 F.2d 279 (7th Cir. 1981).

41. *Id.* at 282 (emphasis supplied).

ent stand that the Seventh Circuit has taken on opinion testimony. In *United States v. West*,⁴² for example, the Seventh Circuit upheld a trial court's refusal to permit a psychiatrist to testify concerning the defendant's limited intelligence.

The testimony was not introduced to show the defendant's state of mind at the time of the occurrence or for that matter, his mental state. Rather, it was presented under Federal Rule of Evidence 404(a)⁴³ as a "character trait", making it unlikely that defendant West was able to harbor the requisite criminal intent.

The Court of Appeals rejected defendant's arguments, holding that "character trait" under Rule 404(a) refers to elements of one's disposition, not his intelligence. The court said:

Neither Rule 404(a)(1) nor any of the cases interpreting the rule defines 'character trait'. No case that we have discovered, however, has ever included intelligence within the purview of the rule. 'Character trait refers to elements of one's disposition, such as honesty, temperance or peacefulness.' *McCormick On Evidence* § 195. We do not believe that intelligence is a character trait within the meaning of the rule.⁴⁴

Having reached the conclusion that the defendant's intelligence was not a character trait, the court concluded that the district court's refusal to permit the psychiatrist to testify as to defendant's limited intelligence was not an abuse of the court's wide discretion concerning expert testimony, stating that

[e]xpert testimony is admissible only when the specialized knowledge of an expert will assist the trier of fact in understanding the evidence or in determining a fact in issue.⁴⁵

Because West had testified, the court concluded that the jury could decide the issue of West's intelligence without need for the psychiatrist's opinion, and thus the expert's testimony would not "aid" the jury's understanding.

Illinois law with respect to character traits is in general accord with Federal Rule 404(a). Thus, it is likely that Illinois trial courts would rule as the Seventh Circuit did in *United States v. West*.

42. 670 F.2d 675 (7th Cir.), *cert. denied*, 102 S. Ct. 2944 (1982).

43. FED. R. EVID. 401(a)(1) provides:

- (a) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
 - (1) Evidence of a pertinent trait of his character is offered by the accused, or by the prosecution to rebut the same.

44. 670 F.2d at 682.

45. *Id.*

II. THE USE OF EXTRAPOLATION EVIDENCE

A second area of interest in Seventh Circuit evidentiary law is the use of extrapolation from evidence presented at trial. In *Illinois Physicians Union v. Miller*,⁴⁶ the Court of Appeals affirmed the use of extrapolation in determining the amount of overpayments to physicians in the Illinois Medicaid Program.

The *Physician's Union* case was a proceeding instituted to challenge the Illinois Department of Public Aid's use of sampling and extrapolation in its auditing procedures.

In auditing a doctor who participated in the defendant's medical program, a sample of 353 records selected at random from 1,302 records indicated that the doctor had been overpaid \$5,018.00. By applying the extrapolation technique to the sampling, the department found the doctor had been overpaid \$18,503.30, and made a recoupment claim for that latter amount.

The doctor contended in the Court of Appeals that the sampling and extrapolation were contrary to the fourteenth amendment to the Constitution and to state law.

The doctor argued that due process required that the department's rulings be based on evidence and that there was no evidence with respect to the cases not audited. She further argued that the effect of the application of the extrapolation concept was to shift the burden of proof as to the unaudited cases from the department to the doctor.

The Court of Appeals rejected the plaintiff's contentions, holding that the use of extrapolation by the department, absent rebuttable evidence, could be the basis of an overcharge determination on the presumption created by the application of extrapolation to the sampling.

The court said with respect to the doctor's characterization of the issues:

As we see it, the issue is not whether overpayments may be statistically presumed, but whether the state, in attempting to preserve its welfare monies, may place the burden on the physician to demonstrate that the Department's calculations are inaccurate. We begin our analysis by noting that this case does not involve an irrebuttable presumption for the Department does not automatically presume liability. Rather, it conducts an initial audit on a substantial portion of the physician's records by examining each individual record in the sample. Thus, overpayments are actually proven with respect to the audited cases.

Section 1396a requires physicians to keep records necessary to

46. 675 F.2d 151 (7th Cir. 1982).

fully disclose the extent of services rendered and to make such records available to state and federal governments as a condition of receiving Medicaid payments. 42 U.S.C. § 1396(a)(27). Payment is made only after the billing forms are submitted evidencing the right to reimbursement. At all times the burden is on the physician to prove entitlement to welfare monies. Thus, the Department's presumption that the percentage of error in the total number of cases is the same as the percentage of error in the audited cases does not have the procedural effect of shifting any burden (citations omitted).⁴⁷

In rejecting the doctor's due process contention, the court said:

There is no merit to Salazar's contention that the Department procedures do not comport with due process. The process due varies with the circumstances and various factors must be considered when evaluating administrative procedures. These factors are: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest; and (3) the governmental interest, including the function involved and the fiscal and administrative burdens that other procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) . . .

We agree with the district court's conclusion that, in view of the enormous logistical problems of Medicaid enforcement, statistical sampling is the only feasible method available.⁴⁸

The doctor also contended that the effect of the department's extrapolation and presumption was to place upon the physician the burden of conducting a 100% audit of her records to overcome the presumption. The court rejected this argument stating:

Rule 9.55 clearly provides that the physician has the alternative of present[ing] evidence to show that the sample used by the Department was invalid and, therefore, cannot be used to project the overpayments or conduct a one hundred percent audit of all medical records and presenting the results at a hearing. Thus, the physician has the option to present evidence deemed persuasive to rebut the finding of overpayments. A one hundred percent audit is not mandated.⁴⁹

Thus, the facts of governmental fiscal interests and the problems involved in administering social programs such as Medicaid led the Seventh Circuit to adopt a position which allowed the admission of unproven facts as facts sufficient to create liability for a defendant. Further, the *Physicians Union* court was willing to raise those "facts" to a level of presumption which, in effect, forces the defendant to disprove the unproven presumption. Where this line of evidentiary law will lead

47. *Id.* at 154.

48. *Id.* at 157. *Accord*, *State of Georgia v. Califano*, 446 F. Supp. 404 (N.D. Ga. 1977).

49. *Id.* at 157-58.

is unclear. But *Physicians Union* indicates both the power of extrapolation and the Seventh Circuit's willingness to let such power be used by parties in a suit.

CONCLUSION

The Seventh Circuit's approach towards opinion testimony and the use of extrapolation indicate a willingness to allow more and varied kinds of evidence to assist the trier of fact in making decisions in a case. The apparent expansion of possibilities for use of opinion testimony, controlled by the requirements that scientific expert opinion be based on accepted principles and that the opinion evidence must aid or help the trier of fact, suggest that the trial lawyer's arsenal can include lay witnesses and experts with the minimal levels of training or education necessary to assist a jury. Further, the use of extrapolation from known facts to unproven conclusions, as well as the presumptions attached to such extrapolation, point to new future sources of evidence and tools for persuasion. Taken together, these developments emphasize the continuing metamorphosis of Seventh Circuit evidentiary law.